In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1952

No. 466

JOHN A. MALONE and ELEANOR F. DANA,
Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA and THE HONORABLE GEORGE B. HARRIS, AS JUDGE THEREOF,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for
the Ninth Circuit
AND
BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA and THE HONORABLE GEORGE B. HARRIS, AS JUDGE THEREOF,
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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of John A. Malone and Eleanor F. Dana for a writ of certiorari to the United States

Court of Appeals for the Ninth Circuit, respectfully shows:

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED.

This was an original application made to the United States Court of Appeals for the Ninth Circuit, seeking permission to file in that Court a petition for writ of prohibition to prohibit and enjoin respondents above named from taking any further action in a criminal cause wherein petitioners were defendants on the ground that said District Court had lost all jurisdiciition in the matter due to an order made by that Court dismissing the indictment.

The documents presented to the Court of Appeals were as follows:

1. Motion for leave to file petition (R. p. 1);[1]
2. Points and authorities (R. p. 2);
3. Petition for writ of prohibition (R. p. 10).

The Court of Appeals denied, without opinion, the motion for leave to file the petition for writ of prohibition on October 31, 1952. (R. p. 20.)

The petition for writ of prohibition (R. p. 10) recited the following facts:

On February 13, 1952 the Federal Grand Jury for the Northern District of California returned to the District Court for said District, an indictment num-

[1]Page references herein are to the page numbers of the typewritten record on appeal, the same not as yet having been printed by the Clerk of the Supreme Court.

bered 33157, wherein your petitioners herein, together with a corporation named as Shumates, Inc., were charged with a violation of Section 371 of Title 18 of the United States Code by unlawfully conspiring to defraud the United States and to commit offenses against the United States. (R. 11.)

On March 13, 1952 your petitioners herein, John A. Malone and Eleanor F. Dana, filed in said District Court their respective motions to dismiss said indictment; that on said last mentioned date certain persons moved the District Court for an order setting aside and quashing the alleged service of summons issued therein on February 14, 1952 and directed to said alleged corporation (R. 11); that said motions to dismiss said indictment and to quash said service of summons came on regularly for hearing before said District Court, the Honorable Louis E. Goodman, Judge Presiding, and after argument were submitted to the Court for its judgment and decisions on said motions; that thereafter and on April 17, 1952, said United States District Court by said Honorable Louis E. Goodman as Judge thereof, *made its order dismissing said indictment as to all defendants* (R. 12).

On April 18, 1952 the United States of America filed in said District Court and cause, a document entitled "Motion for Rehearing" reading as follows:

> "Comes now the United States and moves this Honorable Court to vacate and set aside the order of this Court entered herein on the 17th day of

April, 1952, sustaining the motion of defendants to dismiss, and to grant a rehearing thereon." (R. 12.)

That written notice was served on the attorneys of record appearing for defendants that said motion of the United States would come on for hearing before said District Court and said Judge Louis E. Goodman, on the 25th day of April, 1952; that on said last mentioned date the defendant John A. Malone, by his attorney of record and said defendant Eleanor F. Dana, by her attorney of record, specially appeared in said District Court and objected to the Court hearing said alleged motion for a rehearing or to the Court taking any further action or proceeding in said cause on the ground that said District Court had divested itself of jurisdiction over all matters pertaining to said cause and of all jurisdiction over each of said defendants, for the reason that the Court having dismissed said indictment as to all defendants on April 17, 1952, there was nothing pending before said District Court and that the Court was without jurisdiction to proceed further or to make any additional orders in the case. (R. 12-13.)

On May 16, 1952, despite the opposition and objections of said defendants, who are the petitioners herein, said United States District Court and the Honorable Louis E. Goodman, as Judge thereof, made and entered the following order in writing in said action No. 33157 (R. 14):

"Order Vacating Order Granting Motion to Dismiss, Denying Motion to Dismiss and Granting Motion to Quash as to Defendant Shumates, Inc.

On April 17, 1952, the court, after hearing, sustained defendants' motions to dismiss the indictment herein. Pursuant to the petition of the United States, the Court has reheard the motions. I am now satisfied that the previous order is erroneous and that the court has power to correct it. Ex parte Altman, 34 Fed.Supp. 106 (S.D. Calif. 1940). The indictment adequately charges conspiracy. 18 USC 371. The previous order therefore is vacated and the motions to dismiss are severally denied.

While paragraph 5(b) of the indictment does not adequately charge a *substantive* offense, it is capable of clarification by corrective indictment, if proceedings therefor are had, or if not, the rights of the defendants can be adequately protected by the court at the trial, or after verdict by appropriate motion.

The motion to quash service of summons upon Shumates, Inc., is still before the court and it is granted.

Dated: May 16, 1952.

Louis E. Goodman,
United States District Judge."

That no further action was taken in said cause until the 9th day of October, 1952, whereupon the Clerk of said District Court served a written notice on the respective counsel for said defendants Malone

and Dana and on the Assistant United States Attorney, that on Monday, the 13th day of October, 1952, the matter of indictment No. 33157 would come on before the Judge of the master calendar of said District Court for the taking and entry of the pleas of the said two defendants; that on the 13th day of October, 1952 said matter was continued until the 14th day of October, 1952. (R. 14.)

On October 14, 1952 the defendant John A. Malone by his attorney, James E. Burns, and the defendant Eleanor F. Dana by her attorney, Leo R. Friedman, appeared specially before said United States District Court and the Judge of the master calendar thereof (being the Honorable George B. Harris, one of the respondents above named) and objected to any further action or proceedings being taken in said matter; objected to the insistence of the Court and the United States Attorney that the pleas of said defendants be taken and entered, all on the ground that there was no cause or matter pending before said District Court as, the indictment having been dismissed, the Court was without jurisdiction to proceed further in the matter, and that the order made by said Court and Judge Louis E. Goodman on the 16th day of May, 1952 vacating the order of April 17, 1952 dismissing said indictment as to all defendants was void on its face and could not and did not reinvest the Court with jurisdiction over said indictment or the subject matter thereof or of either of said defendants Malone and Dana; that at said time and place

Judge George B. Harris speaking for and on behalf of said respondent court, emphatically stated that he would be bound by the order made by Judge Louis E. Goodman on May 16, 1952 that the Court and the Judge thereof had jurisdiction to make said last mentioned order, that said last mentioned order had revived the jurisdiction of said District Court over said indictment, the alleged offense set forth therein and over the persons of said defendants. Judge Harris further stated that he, as the Judge of said Court and said Court were fully clothed with jurisdiction to proceed with all future steps in said matter and upon said indictment, that he and said Court would insist upon the entry of pleas of said defendants and if pleas of not guilty were entered would proceed to the trial of said action, or if different pleas were entered would proceed to act in the customary manner upon the entry of said pleas; that an order was then made continuing the entry of pleas by said defendants to the 30th day of October, 1952, all over the objections of said defendants and petitioners herein. (R. 15-16.)

The petition further recited that the respondents had no jurisdiction in said matter of said action due to the fact that the Court by dismissing said indictment as to all defendants on April 17, 1952, thereby lost and divested itself of all further jurisdiction over said action and said defendants and was thereafter without power or jurisdiction to reinstate said indictment and that the order made on

May 16, 1952 vacating the order dismissing said indictment made on April 17, 1952 was and is void and so appears on its face. The petition further alleged that unless restrained and prohibited by order of the Court of Appeals, respondents and each of them intend to proceed to exercise a purported jurisdiction in said criminal cause and have threatened so to do as above set forth in the petition, all to the great prejudice and damage of each petitioner herein; that your petitioners and each of them, have no plain, speedy and adequate remedy in the ordinary course of law; that no appeal lies from the order of the Court made on May 16, 1952 vacating and setting aside the order made on April 17, 1952 dismissing said indictment as to all defendants; that each of your petitioners must appear in said District Court and enter their pleas therein; that they will be forced to enter their pleas of not guilty to said indictment and the charge contained therein; that they will have to employ and compensate counsel for their defense at the trial thereof and will have to stand trial thereof with all its attendant expense, delay, harassment and vicissitudes; that being compelled to submit to said trial and to appear before said District Court as aforesaid will constitute a violation of each of said petitioner's constitutional rights as each of said threatened steps and proceedings in said matter will be without due process of law and in violation of the due process clause of the Constitution of the United States. (R. 16, 17.)

On October 28, 1952 petitioners filed in the Court of Appeals for the Ninth Circuit, their motion for leave to file said petition for writ of prohibition as aforesaid and on October 31, 1952, the United States Court of Appeals for the Ninth Circuit made its order reading in full as follows (R. 20):

> "Upon consideration of the Motion for Leave to file Petition for Writ of Prohibition, said Motion is denied.
>
> Dated: October 31, 1952.
>
> William Denman,
> Chief Judge,
> William Healy,
> Walter L. Pope,
> United States Circuit Judges."

JURISDICTIONAL STATEMENT.

1. Jurisdiction of the Court.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

2. The Order and Decree of the Court of Appeals.

The order and decree of the Court of Appeals denying the motion for leave to file petition for writ of prohibition was made and entered on October 31, 1952. (R. p. 20.)

3. Basis upon which it is contended the Supreme Court has jurisdiction, and cases in support thereof.

Where an original proceeding for an extraordinary writ, such as prohibition, is filed in the Court of Appeals to control the action of the District Court within its circuit and said writ is denied or leave to file the same denied by the Court of Appeals, this Court has jurisdiction to review the action of the Court of Appeals on a writ of certiorari. (*McClellan v. Carland,* 217 U.S. 268, 275-277.)

QUESTIONS PRESENTED.

(1) Where the record discloses that a District Court has knowingly and intentionally dismissed an indictment as to all defendants, is not said District Court thereafter without jurisdiction to take any further steps in said criminal case?

(2) Can a District Court knowingly and intentionally dismiss an indictment as to all defendants

and thereafter reinvest itself with
setting aside said order dismissing sa

(3) Where an application for leav
of prohibition is made to a Court
enjoin a District Court from proceed
a criminal action and said applicatio
face that said District Court is witho
diction and that there is no appeal fr
of the District Court, are not petiti
as a matter of right, to the issuance of

with jurisdiction by
ng said indictment?
r leave to file a writ
ourt of Appeals to
roceeding further in
ication shows on its
without such juris-
peal from the action
petitioners entitled
nce of the writ?

HE ISSUANCE OF
RARI.

**POINTS RELIED UPON FOR THE ISSU
WRIT OF CERTIORARI.**

d for herein should

The writ of certiorari prayed for
issue for the following reasons:

1. The record in the Court of App
its face that the District Court had lo
tion to proceed further in the case.
the Court of Appeals, in denying th
leave to file the petition for writ of ce
tions a procedure whereby a trial Cour
all jurisdiction over a matter may s
invest itself of jurisdiction and subject
and the Government to the expense, tr
vicissitudes of a criminal trial. The ma
is one of grave importance that meri
consideration and decision of this,
Court of the United States.

of Appeals shows on
had lost all jurisdic-
case. The action of
ying the motion for
it of certiorari, sanc-
al Court who has lost
may *sua sponte* re-
subject both a citizen
ense, tribulations and
The matter presented
t merits the earnest
this, the Supreme

2. The action of the Court of A
record before it, is a clear holding t

of Appeals, on the
lding that the inten-

tional dismissal of an indictment by a District Court, not accompanied by any mistake of fact, does not divest such Court of the power to proceed to thereafter try the defendant upon such indictment. This never has been and cannot be the law and the point should be definitely settled by this, the Supreme Court.

WHEREFORE, petitioners respectfully submit that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco, California,
November 24, 1952.

Respectfully submitted,
LEO R. FRIEDMAN,
JAMES E. BURNS,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am one of the counsel for the petitioners in the above entitled cause and that in my judgment the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
November 24, 1952.

LEO R. FRIEDMAN,
Attorney for Petitioners.